SENATE RECORD VOTE ANALYSIS

104th Congress — April 26, 1995, 6:43 p.m.
1st Session — **Vote No. 135** — Page S-5717 Temp. Record

PRODUCT LIABILITY/Equity in Legal Fees

SUBJECT: **Product Liability Fairness Act . . . H.R. 956. Rockefeller motion to table the Abraham modified amendment No. 597 to the Gorton substitute amendment No. 596.**

ACTION: MOTION TO TABLE FAILED, 45-52

SYNOPSIS: As passed by the House, H.R. 956, the Product Liability Fairness Act, will establish uniform Federal and State civil litigation standards for product liability cases and other civil cases, including medical malpractice actions.

The Gorton substitute amendment would apply only to Federal and State civil product liability cases. It would abolish the doctrine of joint liability for noneconomic damages, would create a consistent standard for the award of punitive damages and would limit such damages, and would encourage the adoption of alternative dispute resolution mechanisms.

The Abraham modified amendment would require an attorney, at the initial meeting upon being retained by a party in a Federal civil or diversity action, to inform that party of his or her right to have a written estimate within 30 days of all expected attorney's fees that might result from handling the case. Additionally, no later than 30 days after the date on which a claim or action was finally settled or adjudicated, an attorney would be required to provide a client a written statement containing: the actual number of hours the attorney provided services in connection with the claim; the total amount of the fee for the services provided; and the actual fee per hour charged (the total of hourly, contingent, flat, and other fees divided by the number of hours in which services were provided). The client, in writing, could waive or extend these rights. A client who did not waive these rights and to whom an attorney did not provide the required information could withhold 10 percent of the fee and file a civil action for resulting damages.

Debate was limited by unanimous consent. Following debate, Senator Rockefeller moved to table the Abraham amendment. Generally, those favoring the motion to table opposed the amendment; those opposing the motion to table favored the amendment.

NOTE: Following the failure of the motion to table, the Abraham amendment was adopted by voice vote.

Those favoring the motion to table contended:

(See other side)

YEAS (45)

Republicans (13 or 25%)	Democrats (32 or 71%)	
Cochran	Akaka	Kennedy
Cohen	Biden	Kerrey
D'Amato	Bingaman	Kerry
Gorton	Breaux	Leahy
Gramm	Bryan	Levin
Hutchison	Bumpers	Lieberman
Jeffords	Byrd	Moseley-Braun
Mack	Daschle	Moynihan
Nickles	Dodd	Murray
Roth	Ford	Nunn
Shelby	Graham	Pell
Specter	Harkin	Pryor
Thompson	Heflin	Reid
	Hollings	Rockefeller
	Inouye	Sarbanes
	Johnston	Simon

NAYS (52)

Republicans (39 or 75%)		Democrats (13 or 29%)
Abraham	Helms	Baucus
Ashcroft	Inhofe	Boxer
Bennett	Kassebaum	Bradley
Brown	Kempthorne	Conrad
Burns	Kyl	Dorgan
Campbell	Lott	Feingold
Chafee	Lugar	Feinstein
Coats	McCain	Glenn
Coverdell	McConnell	Kohl
Craig	Murkowski	Lautenberg
DeWine	Packwood	Mikulski
Dole	Pressler	Robb
Domenici	Santorum	Wellstone
Faircloth	Simpson	
Frist	Smith	
Grams	Snowe	
Grassley	Stevens	
Gregg	Thomas	
Hatch	Thurmond	
	Warner	

NOT VOTING (3)

Republicans (2)	Democrats (1)
Bond-[2]	Exon-[2]
Hatfield-[2]	

EXPLANATION OF ABSENCE:
1—Official Buisiness
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

Argument 1:

There is nothing wrong with attorneys disclosing the fees they charge. In fact, we do not know of any attorneys who do not disclose their fees. Most jurisdictions have standard fee levels that are charged. The cases that our colleagues seem most concerned about are contingency fee cases. Many of us have served as lawyers in private practice before becoming Senators. In our practices, we usually took civil cases on a contingency basis simply because that was the only way our clients could afford to pay us. Clients understood upfront the fixed percentage we would get of their awards, and they understood we would be liable for paying any case-related costs. Perhaps other lawyers operated differently, but for us and our clients this arrangement worked well. Frankly, we do not know of any place that this arrangement has resulted in complaints by clients. Our colleagues have cited an airline class-action suit over price fixing as an example in which lawyers overcharged their clients, but if the lawyers involved in that case had not been willing to put that case together no client would have received any payment. Further, while it is true that the judge later stated he thought that he had allowed the attorneys to receive too large a part of the judgment, the fact remains that the attorneys received only what the judge allowed--the point being that judges already carefully monitor attorney fees to make certain that they are not exorbitant.

An additional restraint on overcharging, as our colleagues have noted, comes from other lawyers. Lawyers already effectively police themselves with strict ethical codes that they devise, and those individuals who fail to abide by those high standards lose their reputations, lose their clients, and often are disbarred. Lawyer-bashing has become a popular sport in America (except of course when one needs a lawyer), but the truth is that the profession maintains strict standards of integrity. In short, the Abraham amendment addresses a non-existent need.

In the process, the amendment would create a great deal of havoc. Some Senators who support the Abraham amendment have assured us that when they were in private practice in small firms, they routinely kept the type of detailed records that would be needed under this amendment to compute dollar-per-hour fees. We, though, kept no such records. We never had timeclocks recording how long we were on the phone, how long it took to write a memo, how long we were in court, or how long any other case-related activity took. For us, computing final dollar-per-hour costs would have been a bureaucratic nightmare. Providing estimates would have been worse, because they would have been highly speculative. In starting cases, we very often had no idea if the other side would be willing to settle, so it would have been difficult to provide accurate estimates.

A lawyers' good name and reputation will do much more to ensure fair pricing than any formal bookkeeping requirements ever will. We agree with proponents of the Abraham amendment that lawyers, especially in civil injury cases, should not overcharge their clients, but we deny that such practices are common or that the amendment would do anything to correct any few existing abuses that may exist. Therefore, we urge our colleagues to table the amendment.

Argument 2:

Weighing the bill down with extraneous issues will make it more difficult to pass. We therefore urge our colleagues to table the Abraham amendment, because it would expand the scope of this bill beyond the issue of product liability reform.

Those opposing the motion to table contended:

The Abraham amendment would establish a consumer of legal services' right to know how much he or she is paying and for what services. This right is recognized in most other markets for goods and services, and is already recognized and respected by reputable attorneys. Nonetheless, there are too many cases in this country in which tort victims and other consumers of legal services have real difficulty determining whether they are getting a fair shake from their attorney. As a result, victims receive less of their awards than they should, the legal system costs everyone too much, and ever-higher fees are encouraged by a lack of competition.

The unfairness of our current system is shown by the fact that tort victims receive only 43 cents of every $1 awarded from damages--the other 57 cents goes to lawyers fees and court costs. A significant portion of the 57 cents taken by the legal system goes directly to attorneys. Plaintiff's attorneys, in particular, collect from 33 percent to 40 percent of the average award in contingency fee cases. In cases that go to appeal, the typical fee is 50 percent.

We are not begrudging the hardworking attorney for his or her hard-won fee, nor are we proposing that a set fee should be established (see vote No. 134). However, clearly there is something wrong with a system in which, as was noted by Professor Lester Brickman of the Cardozo School of Law, 25 to 30 percent of all contingency fee cases have no real contingency. In other words, the result is a foregone conclusion, and the attorney acts as little more than a pro forma collection agent. In cases like airline disasters and similar accidents, fault often is not in doubt. Still, plaintiffs' lawyers have been willing to charge their standard contingency fees, and for a minimal amount of work have collected enormous sums.

Often, when their fees in such cases are calculated on a per-hour basis, they are found to have earned tens of thousands of dollars per hour. For example, in a 1989 case in Alton, Texas, in which a delivery truck struck a school bus and killed 21 children, the attorneys' contingency fees exceeded $30,000 per hour for the number of hours actually worked. When someone hires a lawyer, they

have a right to know upfront if they are going to be charged $30,000 per hour. Similarly, after a case is through, they have a right to know if their total attorney fees were as high as $30,000 per hour.

Most professions already provide fee information to their customers. Doctors provide fee schedules to insurers. Architects and even furniture movers provide written, binding estimates upon request. Consumers of legal services deserve the same treatment. Most legal organizations, and most lawyers, agree. A recent formal opinion by the American Bar Association Standing Committee on Ethics (formal opinion No. 94-389) held that regardless of whether a lawyer and client are initially inclined toward a contingency fee, the nature and details of the compensation should be fully discussed before reaching a final agreement, and that discussion should include an estimate of the number of hours the attorney will likely work on the case. State legal ethic organizations have reached similar conclusions. Thus, the Abraham amendment would simply codify an ethical standard that is advocated by lawyers' own watchdog groups.

Many if not most people are rarely in contact with the judicial system in this country. Thus, when they do hire lawyers, they often have little idea of the standard fees that are charged by attorneys, the likelihood they have of winning their cases, or the different options of payment. The result is that legal costs are too high. Contingency fees now run $13 billion to $15 billion annually, which represent a substantial portion of the $132 billion which Tillinghast research estimates is spent each year on our legal system. If Americans are given the opportunity to see in writing exactly what legal services they are being provided and at what prices, they will be able to shop for better deals, and unscrupulous lawyers will no longer be able to overcharge their clients. The Abraham amendment is thus a commonsense, pro-consumer amendment that deserves our strong support.